77-1286

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

PEOPLE OF THE CITY OF EAST DETROIT,
Petitioner,

v.

JAMES D. LLEWELLYN AND LAS VEGAS CINEMA, INC.,
Respondents.

PEOPLE OF THE CITY OF EAST DETROIT,
Petitioner,

v.

ROBERT L. VICKERY, GALEN ODELL BRAYBOY, AND WILLIAM LININGTON,
Respondents.

CAPRI THEATRE COMPANY, INC., a Michigan Corporation,
Respondent,

v.

CITY OF EAST DETROIT, a Michigan Municipal Corporation, MAYOR OF THE CITY OF EAST DETROIT, and CHIEF OF POLICE OF THE CITY OF EAST DETROIT,
Petitioners.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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COUNTER STATEMENT OF QUESTIONS INVOLVED

QUESTION I

CAN THE CITY OF EAST DETROIT ENACT AND ENFORCE AN ORDINANCE WHICH REGULATES THE SHOWING OF OBSCENE MOTION PICTURES CONSISTENT WITH THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS INTERPRETED BY THE UNITED STATES SUPREME COURT?

Trial Court Opinion — NO.

Respondents Contend — NO.

QUESTION II

CAN THE CITY OF EAST DETROIT ENACT AND ENFORCE AN ORDINANCE WHICH REGULATES THF SHOWING OF OBSCENE MOTION PICTURES CONSISTENT WITH THE CONSTITUTION AND LAWS OF THE STATE OF MICHIGAN?

Trial Court Opinion — NO.

Respondents Contend — NO.

QUESTION III

CAN THE CITY OF EAST DETROIT ENACT AND ENFORCE AN ORDINANCE WHICH REGULATES THE SHOWING OF OBSCENE MOTION PICTURES PURSUANT TO ITS POLICE POWERS AS A HOME RULE CITY?

Trial Court Opinion — NO.

Respondents Contend — NO.

QUESTION IV

IS THE CITY OF EAST DETROIT'S OBSCENITY ORDINANCE, CHAPTER 129, TITLE IX, AS AMENDED BY SECTION 9.305A, EFFECTIVE JULY 16, 1973, UNCONSTITUTIONAL PURSUANT TO THE CONSTITUTIONS OF THE UNITED STATES AND THE STATE OF MICHIGAN?

Trial Court Opinion — YES.

Respondents Contend — YES.

QUESTION V

DID THE CITY OF EAST DETROIT, UNDER ITS OBSCENITY ORDINANCE, CHAPTER 129, TITLE IX, AS AMENDED, VIOLATE RESPONDENT'S PROCEDURAL RIGHTS AS TO SEIZURE OF FILM AND TRIAL PROCEEDINGS?

Trial Court Opinion — NOT CONSIDERED.

Respondents Contend — YES.

QUESTION I

CAN THE CITY OF EAST DETROIT ENACT AND ENFORCE AN ORDINANCE WHICH REGULATES THE SHOWING OF OBSCENE MOTION PICTURES CONSISTENT WITH THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS INTERPRETED BY THE UNITED STATES SUPREME COURT?

Trial Court Opinion — NO.

Respondents Contend — NO.

Michigan Court of Appeals — YES.

Michigan Supreme Court — NO.

ARGUMENT

Respondents claim that the Ordinance under which Respondents were prosecuted is constitutionally defective and void. The pertinent parts of the Ordinance. designated as Chapter 129 of Title 9 of the Code of the CITY OF EAST DETROIT are as follows:

> "Section 9.301, as amended, shall read:
>
> "Any person who knowingly either sells, lends, gives away, distributes, shows or transmutes or offers either to sell, lend, give away, distribute, show or transmute, or has in his possession with intent to either sell, lend, give away, distribute, show or transmute, or advertise in any manner, or who otherwise knowingly offers for either loan, gift, sale or distribution, any obscene, lewd, lascivious, filthy or indecent, sadistic or masochistic book, magazine, pamphlet, newspaper, story paper, writing paper, phonograph record, picture, photograph, motion picture film, figure, image, wire or tape recording or any written, printed or recorded matter of an indecent character, which is distinguished

or characterized by its emphasis on matter depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Areas," (as defined below in Section 9.305A), which may or may not require mechanical or other means to be transmuted into auditory, visual or sensory representation of such character, shall be guilty of a misdemeanor, and upon conviction shall be punished as provided in Section 9.306 of this Ordinance."

"Section 9.302 *Obscene literature, recording or image; impact upon average person of community.*

"The test to be applied in cases under Section 9.301 of this Ordinance shall not be whether sexual desires or sexually improper thoughts would be aroused in those comprising a particular segment of the community, the young, the immature or the highly prudish or would leave another segment, the scientific or highly educated or the so-called worldly wise and sophisticated, indifferent and unmoved. But such test shall be the effect of the book, picture, or other subject to complaint considered as a whole, not upon any particular class, but upon all those whom it is likely to reach, that is, its impact upon the average person in the community. The book, picture, or other subject of complaint must be judged as a whole in its entire context, not by considering detached or separate portions only, and by the standards of common conscience of the community of the contemporary period of the violation charged."

"Section 9.305A *Definitions.*

"(1) 'Specified Sexual Activities are defined as:

(a) Human genitals in a state of sexual stimulation or arousal;

(b) Acts of human masturbation, sexual intercourse or sodomy;

(c) Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

"(2) 'Specified Anatomical Areas' are defined as:

(a) Less than completely and opaquely covered:

(1) Human genitals, pubic region.

(2) Buttock.

(3) Female breast below a point immediately above the top of the areola.

(b) Human male genitals in a discernibly turgid state, even if completely and opaquely covered."

(Please note that this is the Ordinance under which Respondents were prosecuted by the City of East Detroit, *Not* the one *later* amended by the City which appears on pages 90 through 995 of Petitioners' Brief.)

At the time the United States Supreme Court declared obscenity to be outside the First Amendment, Guarantee of Free Speech, (*Roth* v *US,* 354 US 476; 1 L Ed 2d 1498; 77 S Ct 1304 [1957]), it had attempted to define what constitutes obscenity. In *Memoirs* v *Massachusetts,* 383 US 413, 418; 16 L Ed 2d 1; 86 S Ct 975 [1966], Justice Brennan wrote:

"We defined obscenity in *Roth* in the following terms: '[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.' 354 US at 489. Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

In *People* v *Bloss,* 388 Mich 409 [1972], and the most recent Michigan Supreme Court decision on this particular point, the Defendant, *Bloss,* was discharged from selling obscene literature because the Michigan Supreme Court found that the Defendants did not sell magazines that were constitutionally obscene, in accordance with a test applied in the case of *Redrup* v *New York,* 386 US 767; 18 L Ed 2d 515; 87 S Ct 1414 [1967]. On June 25, 1973, the United States Supreme Court vacated the Judgment and remanded the case of *People* v *Bloss,* 413 US 909; 37 L Ed 2d 1021; 93 S Ct 3060 [1973], for further proceedings in the light of *Miller, Slaton, Heller, Roaden* and other cases.

In *Redrup,* the Court required three tests to be met to determine if any material was constitutionally obscene: involvement of juveniles; assault upon individual privacy so as to make it impossible for an unwilling individual to avoid exposure to it; and evidence of pandering (see pp 416, 422 of the *Bloss* decision, *infra*). Since *Redrup,* the United States Supreme Court has reversed approximately 31 cases on the basis of that decision.

Justice Harlan noted in his concurring and dissenting opinion in *Ginsburg* v *New York,* 390 US 629, 676, 704-705, 707; 20 L Ed 2d 195; 88 S Ct 1274 [1968]:

> "The subject of obscenity has produced a variety of views among the members of the Court unmatched in any other course of constitutional adjudication * * *.
>
> "The upshot of all this divergence in viewpoint is that anyone who undertakes to examine the Court's decisions since *Roth* which have held particular material obscene or not obscene would find himself in utter bewilderment."

Judge Letts, the Trial Judge in *People* v *Bloss,* further said in the notes, at page 416:

> "So, therefore, it would seem that *Roth* v. *United States,* probably is, or may or may not still be the standard; and *Redcup* still may or may not be the law, because the Supreme Court has indicated that each individual case will stand or fall upon the facts as they are presented. And whether the law as it has been presented, as it has been compounded or propounded is applicable. In other words, *the entire field of obscenity is in a morass,* and it is my opinion that each case must be decided upon its own, according to its own values as presented in Court." (Emphasis added)

As pointed out in the notes in *People* v *Bloss,* page 424, Professor Frederick V. Bernard, who testified as an expert on obscenity *for* the People in Kent County Circuit Court Case No. 11929 in the prosecution of the TROPIC OF CANCER and TROPIC OF CAPRICORN, which were held to be obscene, indicated under oath that he had reread both books and said that they were absolutely *not* obscene.

Coupled with the difficulty of defining obscenity such that it can be prosecuted, is the additional difficulty in determining what was meant in the *Roth* decision that obscenity is to be defined by reference to "community standards." Chief Justice Warren, in his dissent in *Jacobellis* v *Ohio,* 378 US 184, 195; 12 L Ed 2d 793; 84 S Ct 1676 [1964], said:

> "It is my belief that when the Court said in *Roth* that obscenity is to be defined by reference to 'community standards,' it meant community standards — not a national standard, as is sometimes argued. I believe that there is no provable 'national standard' . . . At all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one."

However, in the majority opinion written by Justice Brennan in that case, he indicated that the "community stand-

ards'' test ''must be determined on the basis of a national standard.''

Desiring to end the confusion and to formulate standards more concrete than those used in the past, the Court recently undertook to decide five more obscenity cases. In the course of its five decisions, *Miller* v *California*, 413 US 15; 37 L Ed 2d 419; 93 S Ct 2607 [1973]; *Paris Adult Theatre I* v *Slaton*, 413 US 49; 37 L Ed 2d 446; 93 S Ct 2628 [1973]; *United States* v *Orito*, 413 US 139; 37 L Ed 2d 513; 93 S Ct 2674 [1973]; *Kaplan* v *California*, 413 US 115; 37 L Ed (2) 492; 93 S Ct 2680; reh den 414 US 883; 38 L Ed (2) 131; 94 S Ct 28 [1973]; *United States* v *12 200-ft Reels of Super 8mm Film*, 413 US 123; 37 L Ed 2d 500; 93 S Ct 2665 [1973], each decided by a five to four margin, the Court enunciated a new standard for judging obscenity. The majority opinion in *Miller*, authored by Chief Justice Burger, states, at page 25:

> ''The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable STATE law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.'' (Emphasis added)

As Mr. Justice Brennan pointed out in his *Paris* dissent, the formulation approved by the majority differs very little from the *Memoirs* criteria. Parts (a) and (b) of the two formulations are virtually identical. Only part (c) of the *Miller* formulation even purports to be a significant break with the past. In adopting part (c) of its formulation, the Court explicitly rejected the ''utterly without redeeming social value'' test of *Memoirs*. Yet, its own test differs more in tone than in substance from the old one.

The real difference between *Miller* and earlier obscenity decisions of the Court is its express rejection of the national standards of *Jacobellis*. The Court conceded that the content of the First Amendment does not vary from community to community, but insisted nevertheless that it was impossible to articulate a single, national standard of what appeals to the prurient interest or is patently offensive.

The dissenting opinions of Justices Douglas and Brennan offer alternative methods of disengaging from the tangled web of obscenity litigation. Indeed, Justice Douglas asserted that the First Amendment allows no place for the control of obscenity. Justice Brennan, on the other hand, would prefer to remove restrictions on the distribution and use of obscene materials among consenting adults. Either of these approaches would certainly make obscenity law less confusing. Indeed, the Chief Justice even expressed the hope that the *Miller* formulation would provide more positive guidance in the area. But the majority conceded that the course it chose might not be an easy one, and that difficulties might continue to arise.

The difficulties became evident in an article from TIME Magazine, July 2, 1973, issue, on page 45 entitled, ''The Law,'' in which Robert Bernstein, head of Random House, saw the decision as ''a call to arms of every crazy vigilante group in this county.'' Michigan Attorney General Frank Kelly warned:

> ''This really sets us back in the dark ages. Now prosecuting attorneys in every county and state will be grandstanding, and every jury in every little community will have a crack at each new book, play and movie.''

The article went on to say that Chief Justice Burger, for a man so careful to tell the states to be precise (in the opinion) in drawing up their laws on sexual conduct, he

was remarkably imprecise in his own definition. Sexual conduct, in his view, includes "patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals" as well as "ultimate sexual acts, normal or perverted." "But 'patently offensive' by whose standards?" asks the article.

It would seem, therefore, a direct review of the pertinent language of the Opinion in *Miller* v *California,* 413 US 15; 37 L Ed 2d 419; 93 S Ct 2607 [1973], is necessary to determine what the Court meant. Chief Justice Burger, in writing the majority opinion on page 20 states:

> "It is in this context that we are called on to define the standards which must be used to identify obscene material that a STATE may regulate without infringing the First Amendment as applicable to the States through the Fourteenth Amendment." (Emphasis added)

and indicated that it was the desire of the Court to undertake "to formulate standards more concrete than those in the past." The Chief Justice then states at pages 23 and 24:

> "This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment. . . .
>
> "We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. STATE statutes designed to regulate obscene materials must be carefully limited. . . ." (Emphasis added)

He then stated at page 25:

> "If a STATE law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary."(Emphasis added)

He further indicated at page 25:

> "We emphasize that it is not our function to propose regulatory schemes for the STATES. *That must await their concrete legislative efforts."* (Emphasis added)

However, having earlier said, "Obscene material is unprotected by the First Amendment," he then states at page 26:

> "At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection."

So the Chief Justice has indicated the existence of First Amendment protection to prurient, patently offensive sexual conduct under certain circumstances. He then concludes at page 27:

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating STATE law, as written or construed." (Emphasis added)

It is noteworthy that the Defendants in this case have been the subject of prosecution without benefit of "regulating STATE law." He indicates on page 29:

> "Nor should we remedy 'tension between state and federal courts' by arbitrarily depriving the STATES of a power reserved to them under the Constitution." (Emphasis added)

In discussing community standards, the Chief Justice said at page 31:

> "During the trial, both the prosecution and the defense assumed that the relevant 'community standards' in making the factual determination of obscenity were those of the *State of California,* not some hypothetical standard of the entire United States of America."

It would seem from the Chief Justice's language in this regard that he is relating community standards to a STATE, as opposed to the former national standards laid down in *Jacobellis.*

As Justice Douglas observed in his dissent at pages 43 and 44:

> "Obscenity — which even we cannot define with precision — is a hodge-podge. To send men to jail for violating standards they cannot understand, construe, and apply is a monstrous thing to do in a Nation dedicated to fair trials and due process."

Chief Justice Burger, on the same day, delivered a majority opinion in *Paris Adult Theatre I* v *Slaton,* 413 US 49; 37 L Ed 2d 446; 93 S Ct 2628 [1973], dealing with the prosecution of two allegedly obscene films in Georgia under the Georgia statute. He indicated on pages 53 and 54:

> "We do not undertake to tell the STATES what they must do, but rather to define the area in which they may chart their own course in dealing with obscene material." (Emphasis added)

Chief Justice Burger then states at pages 60 and 61:

> "Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the *legislature of Georgia* could quite reasonably determine that such a connection does or might exist." (Emphasis added)

Chief Justice Burger concludes on page 69:

> "We have directed our holdings, not at thoughts or speech, but at depiction and description of specifically defined sexual conduct that STATES may regulate within limits designed to prevent infringement of First Amendment rights.
>
> ". . . In this case we hold that the STATES have a legitimate interest in regulating commerce in obscene material and in regulating exhibition of obscene materterial in places of public accommodation, including so-called 'adult' theatres from which minors are excluded." (Emphasis added)

Interesting to note from these statements by Chief Justice Burger is again (1) reiteration of power only to States; (2) his statement that the States have a legitimate interest in regulating commerce, which, obviously, a City or Township or local community would not have in its power, and (3) the language is "regulating" exhibition of obscene material, not "prohibiting" exhibition of obscene material.

As Justice Brennan observed in his dissent, at page 86:

> ". . . a vague statute fails to provide adequate notice to persons who are engaged in the type of conduct that the statute could be thought to proscribe. The Due Process Clause of the Fourteenth Amendment requires that all criminal laws provide fair notice of 'what the STATE commands or forbids.'" (Emphasis added)

Interpretation Of The Case Of *Miller* And Its Sister Cases Decided June 21, 1973

Judge Harold Leventhal, a United States Circuit Judge in the United States Court of Appeals for the District of Columbia Circuit, in the November, 1973, issue of the American Bar Association Journal, states on page 1262:

> "On balance, I venture that the Court will permit a STATE law to use a 'local' municipal or county standard, assuming the STATE legislature (or authoritative STATE court) declares that it is STATE policy to permit local option." (Emphasis added)

Judge Leventhal comments on the further problem of the language in *Miller* that work must be "taken as a whole" in applying prurient interests or serious literary value.

> "However, the words 'taken as a whole' are omitted from the patent offensiveness test. Is the jury to be instructed that it is enough if one page of a 300-page book is patently offensive, even though the book as a whole, is not?"

On page 1264 of the same article, Judge Leventhal concludes:

> "These problems suggest that the proper forum for decision is a LEGISLATURE rather than a court.
>
> "Finally, it is peculiarly a matter for the legislatures to resolve the 'local option' issue, to decide whether it is the STATE or a locality, and if so, which one, that defines the application of the STATE law's specific criteria." (Emphasis added)

Judge Leventhal concludes:

> "On the other hand, would the Supreme Court stand by if PLAYBOY were banned in Albermarle County, Virginia? The Court may start by assuming that communities will be restrained in their restraints. But would it say that a blue-nosed application of permissible standards in a community is of no concern to it?"

Following the opinion on *Miller,* a three judge panel in the Recorder's Court for the City of Detroit declared unconstitutional the Michigan Obscenity Statute, MCLA §750.-343(a), and in a case entitled *People of the State of Michi-*

gan v *One Motion Picture Film Entitled "DEEP THROAT"* Recorder's Court Search Warrant File No. 6139, the Court commented on page 3 of the Opinion:

> "Although the case of *Miller* v *California,* 408 U.S. ....., 37 L. Ed. 2d. 419, 93 S. Ct. 2607 (1973) grants the STATES greater latitude than has previously existed, the opinion in that case does not allow for unrestrained prosecutions. Nor does *Miller* leave the question of determining what to prosecute for obscenity to the unbridled discretion of individual prosecutors." (Emphasis added)

The three judge panel then stated on page 7:

> "The material sought to be prohibited must offend the current *statewide,* not national, community standards of the average person. The STATE legislature rather than this Metropolitan Court, or even our seven member Supreme Court, seems best suited for drawing the specific lines now permitted by Miller."

The Court concluded:

> ". . . that although the film DEEP THROAT is within the class of material which may legitimately be regulated by the STATE, there is no STATE law, either statutory or judicial, which 'specifically defines' the depictions of sexual conduct which the STATE may regulate or prohibit.
>
> "Until the legislature acts or, until the Michigan Supreme Court construes the existing statute to specifically designate or define what may not be depicted *there can be no prosecution for displaying the film in question."* (Emphasis added)

Again, as Chief Justice Burger indicated, there would be no prosecution under applicable STATE law; however, these Defendants were still prosecuted.

A case in which the parties *stipulated* on the record to violate the *Miller* standards is the case of *Kent County Prosecutor* v *Robert Emmett Goodrich Corporation,* 53 Mich App 267 [1974] wherein Defendant was prosecuted under Michigan Civil Obscenity Statute, MCLA §600.2938; MSA §27A.2938, for showing the film THE DEVIL IN MISS JONES in Grand Rapids.

The parties stipulated:

> ". . . that the film depicted patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, and patently offensive representations or descriptions of masturbation, excretory functions and lewd exhibitions of the genitalia. The parties further stipulated that the film's predominant appeal is to prurient, shameful and morbid interest in nudity, sex and excretion, which went substantially beyond customary limits of candor in the community in describing or representing such matters. Finally, it was stipulated that the movie lacks serious literary, artistic, political, or scientific value."

The Court held that the Michigan Statute is couched in terms of expression rather than specifically defined sexual conduct, as required by *Miller.* It further held that only a Court of *statewide* jurisdiction, such as the Court of Appeals or the Michigan Supreme Court, could render an authoritative construction of a STATE statute, as required by the *Miller* Opinion, and it came to the conclusion that enjoining the exhibition of the film was improper. Judge McGregor stating at page 275:

> ". . . since there is no STATE law, either statutory or judicial, which 'specifically defines' the depictions of sexual conduct which the STATE may regulate. The trial judge lacked the power to authoritatively construe the statute." (Emphasis added)

Petitioner relies heavily on *Times Film Corporation* v *City of Chicago,* 365 US 43; 5 L Ed 2d 403; 81 S Ct 391 [1961]. However, this case, decided on a 5-4 decision, was based on the sole claim of "previous restraint" on freedom of speech on a very narrow issue and, as Justice Clark said at page 405:

> "It does not require that any consideration be given to the validity of the standards set out (in the Ordinance) therein."

And at page 408, he concluded:

> "We, of course, are not holding that City officials may be granted the power to prevent the showing of any motion picture they deem unworthy of a license."

and as appears from the facts in the case on appeal, this action is exactly what the CITY OF EAST DETROIT undertook.

It is also the contention of Respondents that the *Miller* case implicitly overrules the *Times Film Corporation* case wherein Chief Justice Burger made reference to said *Times* case in his statement of applicability of State law in pornography prosecution, at page 24:

> "As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable STATE law as written or authoritatively construed." (Emphasis added)

In the cases of *Hamling* v *US,* 418 US 87; 41 L Ed 2d 590; 94 S Ct 2887 [1974], and *Jenkins* v *Georgia,* 418 US 153; 41 L Ed 2d 642; 94 S Ct 2750 [1974], Justice Rehnquist, speaking for the majority, amplifies on the question as to the *Miller* case's comment regarding national standards as opposed to community standards by stating:

> "A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law."

He did go on to say:

> "Our holding in *Miller* that California could constitutionally proscribe obscenity in terms of a 'statewide' standard did not mean that any such precise geographic area is required as a matter of constitutional law."

On the same page he states:

> "Since this case was tried in the Southern District of California, and presumably jurors from throughout that judicial district were available to serve on the panel which tried petitioners, it would be the standards of that 'community' upon which the jurors would draw."

So if any conclusion can be reached from the impact upon *Miller,* it is destructive upon the position of EAST DETROIT and emphasizes the position taken by the Defendants herein that the CITY OF EAST DETROIT has tried to establish that application of "community standards" means the enactment of a City Ordinance containing standards of the local community. No such expression has been stated by the United States Supreme Court. The concept the United States Supreme Court has tried to explain is that the traditional posture of the United States Supreme Court of applying uniform national standards in judging obscenity is no longer possible and that jurors should apply standards in a geographical community of interests in applying the law, but the law that should be applied is *applicable State law.* Justice Rehnquist reemphasized that point throughout his Opinion by citing language from the

Miller case throughout (see pages 15 CrL 3244, 3246, 3247). The trial judge in the *Hamling* case instructed the jury in no less than 18 specific times that they must apply national standards, despite the fact that *Miller* v *California* was the law of the land, and indicated that national standards no longer applied, and the Supreme Court in *Hamling* reemphasized that rule.

In the case of *Jenkins* v *Georgia,* 41 L Ed 2d 642; 94 S Ct 2750 [1974] wherein Defendants were charged under the Georgia State Code for obscenity in the showing of the film, CARNAL KNOWLEDGE, Justice Rehnquist, in delivering the majority Opinion, again indicated that the Constitution does not require that juries be instructed in State obscenity cases to apply the standards of a hypothetical statewide community. He went on to say on page 157:

> "*Miller* approved the use of such instructions; it did not *mandate* their use. What *Miller* makes clear is that state juries need not be instructed to apply 'national standards.' "

He then stated:

> "We also agree with the Supreme Court of Georgia's implicit approval of the trial court's instructions directing jurors to apply 'community standards' without specifying what 'community.' *Miller* held that it was constitutionally permissible to permit juries to rely on the understanding of the community from which they came as to contemporary community standards, and the STATES have considerable latitude in framing STATUTES under this element of the *Miller* decision. A STATE may choose to define an obscenity offense in terms of 'contemporary community standards' as defined in *Miller* without further specification, as was done here, or it may choose to define the standards in more precise geographic terms, as was done by California in *Miller.*" (Emphasis added)

Justice Rehnquist then made clear that the *Miller* cases and the ones that have followed are adopting a rule which is designed to prohibit by State law "public portrayal of hard-code sexual conduct for its own sake and for ensuing commercial gain," (See page 161), which proposition follows from the statement by Justice Burger in *Miller* on page 26 wherein he said:

> "At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political or scientific value to merit First Amendment protection."

So neither of these cases assists the CITY OF EAST DETROIT in its prosecution, but, if anything, supports the Defendants in the legal proposition of *Miller* that:

1) Defendants in obscenity cases must be prosecuted under *applicable STATE law* as written or authoritatively construed, *Miller* v *California,* 413 US 15; and,

2) Local juries may apply a vague and sometimes questionable community standard of sexual conduct, but must do so under *applicable STATE law.*

Finally, the most difficult problem the CITY OF EAST DETROIT encounters as to their legal position is the frank admission by City Attorney Mihelich in oral argument on June 24, 1974, wherein on the Court's record he admitted that subsequent to the prosecution of these Defendants the CITY OF EAST DETROIT amended the Ordinance under which these Defendants were prosecuted and are being prosecuted to make it conform to the *Miller* opinion, which statement by the City Attorney is an acknowledgment that the Ordinance under which the Defendants were prosecuted did *not* conform to the *Miller* case; otherwise it would not have been necessary for the CITY OF EAST DETROIT to make such amendments.

Conclusions

1. If Respondents can be prosecuted under the decisions flowing from *Miller,* they must be prosecuted under an applicable STATE law, not an Ordinance adopted by the CITY OF EAST DETROIT.

2. At the time of the alleged offense on October 23, 1974, there was no "applicable STATE law" in Michigan under which Respondents could be prosecuted.

3. Even if under the cases cited heretofore the CITY OF EAST DETROIT had the power to adopt an Ordinance such as the one in question, the Ordinance itself is defective under the requirements of *Miller* and *Paris Adult Theatre I* in terms of the language and the test to be applied, in that:

(a) Nowhere in the test stated in the Ordinance Section 9.302 are the so-called three elements that must coalesce according to *Miller,* such as "appeals to a prurient interest in sex," "patently offensive," and "taken as a whole, does not have serious literary, artistic, political or scientific value."

(b) It is not "specifically defined by applicable STATE law."

(c) It prohibits showing of sexual intercourse although the case of *People* v *Danielac,* 38 Mich App 230, approves the same.

(d) It prohibits the depicting of less than completely or opaquely pubic region although the same was held to be not obscene in the case of THE LAST PICTURE SHOW, even when completely uncovered.

(e) It apparently prohibits or designates as obscene fondling a completely covered buttock.

(f) It prohibits less than completely and opaquely covered female breasts below a point immediately

above the top of the areola, although the same was deemed not obscene in THE LAST PICTURE SHOW. (*BBS Productions, Inc.* v. *Purcell,* 360 F. Supp. 801 (1973); *U.S.* v. *25,000 Magazines Entitled Revue,* 254 F. Supp. 1014 [1966]).

4. The EAST DETROIT City Attorney admitted on the record of oral argument that the Ordinance under which these Respondents were prosecuted did not comply with the *Miller* decision at the time of their prosecution, and it was necessary for the CITY OF EAST DETROIT to amend the Ordinance in an effort to seek such compliance.

QUESTION II

CAN THE CITY OF EAST DETROIT ENACT AND ENFORCE AN ORDINANCE WHICH REGULATES THE SHOWING OF OBSCENE MOTION PICTURES CONSISTENT WITH THE CONSTITUTION AND LAWS OF THE STATE OF MICHIGAN?

Trial Court Opinion — NO.

Respondents Contend — NO.

Michigan Court of Appeals — YES.

Michigan Supreme Court — NO.

ARGUMENT

This question has been answered in the negative in the preceding argument, in that the cases cited by Respondents indicate that a municipality does not have sufficient power and should not have such power.

It should be remembered that the governmental structure of the United States includes, in addition to the Federal Government and the fifty States, a total of 13,049 counties, 18,048 municipalities, and 17,015 townships (United States Bureau of the Census: Statistical Abstract of the United States, 1969, p 405).

If a film can be denied First Amendment protection because it does not meet the community standards of Oshkosh, or because it appeals to the prurient interest of the people in the City of Pine Bluff, the First Amendment is dead for all practical purposes, at least where material is challenged as obscene. In *United States* v *Klaw,* 350 F 2d 155 (2 Cir 1965), the Court recognized the serious threat to freedom of expression implicit in giving free rein to local communities to exclude from the First Amendment what they do not like (350 F 2d at 170):

> ". . . . While there is some merit to the opinion of those who say that appellate courts should not have to sit as a board of censors supervising the work of the police, the motion picture censorship bureaus, the schools, the churches and other organizations that have their lists of good and bad books and motion pictures, there is even more merit to the view that once these preferences are enforced upon others, we 'cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected' . . . Unless there be this protection, a witch hunt might well come to pass which would make the Salem tragedy fade into obscurity."

Finally, the New York Court of Appeals, in the case of *New York State* v *Buckley and Goldstein,* 352 N.Y.S. 2d 601 [1973], through Judge Gabrielli, state at page 608:

> "We take pains to declare that in determining whether any material is patently offensive or obscene, the community standard to be applied is a STATE standard." (Emphasis added)

As Judge Charles L. Levin, quoted in page 418 of *People* v *Bloss*, describing the judicial reaction to *Redrup* at that time:

> "I am in entire agreement with my colleagues that the seized magazines are vulgar, tawdry, and unpleasant. The question before us, however, is not whether these odious magazines are obscene in the ordinary sense of the word — they clearly are — but whether they are obscene in the constitutional sense. The phrase 'obscene in the constitutional sense' is a term of art coined by the United States Supreme Court and, to the extent it has defined that term, its definition is controlling upon us. Neither my personal opinion nor, I respectfully add, the opinions of my colleagues is relevant where there is a controlling opinion from the United States Supreme Court.
>
> "The United States Supreme Court has undertaken the exposition and control of the development of this area of the law. It has made it very clear that only in extraordinary cases will publications be deemed obscene in the constitutional sense."

In other words, the CITY OF EAST DETROIT begs the question by citation of a City Charter to give itself authority to adopt the Ordinance in question. As Justice Levin indicated, the United States Supreme Court controls as to the constitutionality of municipal Ordinances, and it is unquestioned law that any contravening of the Constitution is invalid and inoperative (*Gentzler* v. *Constantine Village Clerk*, 320 Mich 394, 1948).

QUESTION III

CAN THE CITY OF EAST DETROIT ENACT AND ENFORCE AN ORDINANCE WHICH REGULATES THE SHOWING OF OBSCENE MOTION PICTURES PURSUANT TO ITS POLICE POWERS AS A HOME RULE CITY?

Trial Court Opinion — NO.

Respondents Contend — NO.

Michigan Court of Appeals — YES.

Michigan Supreme Court — NO.

ARGUMENT

Again, Respondents feel the prior argument controls on this question, and the answer is NO. The City attempts to beg the question again by a citation of its constitutional and statutory powers. It is interesting to note from the Burger Opinion in *Miller* that the Court makes no effort to deal with the question contained in the CITY OF EAST DETROIT Charter dealing with "all things detrimental to the health, morals, comfort, safety and welfare of the inhabitants," and it has not been clearly established by the *Miller* Opinion that regulation of pornography can be justified under such Charter provision. In fact, the contrary would appear to be true, wherein on pages 60 and 61 of the *Miller* Opinion Justice Burger admitted, "There is no conclusive proof of a connection between anti-social behavior and obscene material."

The Presidential Commission on Obscenity and Pornography has reported in the August 6, 1970, issue of the Los Angeles Times (Part 1, page 5):

> "Research indicates that erotic materials do not contribute to the development of character deficits, nor operate as a significant factor in antisocial behavior or in crime and delinquency causation."

There is no evidence, the Report concluded:

> "... that exposure to pornography operates as a cause of misconduct in either youths or adults."

Therefore, the City Ordinance cannot be justified on the Charter power since there has not been and could not be a showing that the items sought to be prohibited or regulated, to wit: obscene movies, are "detrimental to the health, morals, comfort, safety and welfare of the inhabitants of the CITY OF EAST DETROIT."

QUESTION IV

IS THE CITY OF EAST DETROIT'S OBSCENITY ORDINANCE, CHAPTER 129, TITLE IX, AS AMENDED BY SECTION 9.305A, EFFECTIVE JULY 16, 1973, UNCONSTITUTIONAL PURSUANT TO THE CONSTITUTIONS OF THE UNITED STATES AND THE STATE OF MICHIGAN?

Trial Court Opinion — YES.

Respondents Contend — YES.

Michigan Court of Appeals — YES.

Michigan Supreme Court — YES.

ARGUMENT

Respondents believe they have established in the Arguments under the previous Questions that the Answer to this Question IV is and should be YES.

QUESTION V

DID THE CITY OF EAST DETROIT, UNDER ITS OBSCENITY ORDINANCE, CHAPTER 129, TITLE IX, AS AMENDED, VIOLATE RESPONDENT'S PROCEDURAL RIGHTS AS TO SEIZURE OF FILM AND TRIAL PROCEEDINGS?

Trial Court Opinion — NOT CONSIDERED.

Respondents Contend — YES.

Michigan Court of Appeals — NOT CONSIDERED.

Michigan Supreme Court — NOT CONSIDERED.

ARGUMENT

Respondents claim that the procedures taken under the Ordinance in the prosecution of these proceedings violated Respondents' constitutional rights, *in the event the EAST DETROIT Ordinance is legally valid.*

The Motion Picture Film, THE COLLEGIATES, was illegally seized and illegally retained by the EAST DETROIT police. In the case of *Marcus* v *Search Warrant of Property,* 367 US 717; 6 L Ed 2d 1127; 81 S Ct 1708 [1961], the Court held that a Warrant for the seizure of allegedly obscene books could not be issued on the conclusory opinion of a police officer that the books sought to be seized were obscene. "The warrants issued on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered by the complainant to be obscene . . ." (pages 731-732) and there had been no step in the procedure before seizure designed to "focus searchingly on the question of obscenity" (page 732).

In the case of *Lee Art Theatre* v *Virginia,* 392 US 636; 20 L Ed 2d 1313; 88 S Ct 2103 [1968], the Court held that the warrant was issued on the basis of a police officer's affidavit giving the titles of the film and asserting in a conclusory fashion that he had personally viewed the films and considered them obscene. The Court reversed the Petitioner's conviction because, "The procedure under which the warrant issued solely upon the conclusory assertions of the police officer without any inquiry by the justice of the peace into the factual basis for the officer's conclusions was not a procedure 'designed to focus searchingly on the question of obscenity.' " (*Marcus* at page 732)

> "Seizing a film, then being exhibited to the general public, presents essentially the same restraint on expression as the seizure of all the books in a bookstore. Such precipitous action by a police officer, without the authority of a constitutionally sufficient warrant, is plainly a form of prior restraint and is, in those circumstances, unreasonable under Fourth Amendment standards." (*Stanford* v *Texas,* 379 US 476 [1965]; 13 CrL 3246).

The Court held in *Roaden* v *Kentucky,* 413 US 496; 37 L Ed 2d 757; 93 S Ct 2796 [1973], wherein Chief Justice Brennan delivered the majority opinion and stated:

> "Moreover, ordinary human experience should teach that the seizure of a movie film from a commercial theatre with regularly scheduled performances, where a film is being played and replayed to paid audiences, presents a very different situation from that in which contraband is changing hands or where a robbery or assault is being perpetrated. In the latter settings, the probable cause for an arrest might justify the seizure of weapons or other evidence or instruments of crime, without a warrant."

In *Roaden,* the seizure was upon the police officer's conclusion that the film was obscene without obtaining a warrant. However, it is Respondents' contention that the alleged Affidavit signed by Det/Sgt Durning again states "his opinion" that the motion picture was obscene, lewd, lascivious, filthy and indecent, which are all conclusory assertions. In fact, the search warrant itself merely states, "THE COLLEGIATES, 'which was obscene in nature.' " There is nothing in the warrant issued by the Judge, nor the Affidavit signed by Det/Sgt Durning, in accordance with the three-pronged test as recited by *Miller* v *California.* As Chief Justice Burger said in *Roaden,* at page 506:

> "If, as *Marcus* and *Lee Art Theatre* held, a warrant for seizing allegedly obscene material may not issue on the mere conclusory allegations of an officer, a *fortiori,* the officer may not make such a seizure with no warrant at all. 'The use by the government of the power of search and seizure as an adjunct to a system for the suppression of objectionable publications is not new. . . The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression.'
>
> "In this case, as in *Lee Art Theatre,* the admission of the film in evidence requires reversal of petitioner's conviction."

It is the contention of Respondents that the case of *Heller* v *State of New York,* 413 US 483; 37 L Ed 2d 745; 93 S Ct 2789 [1973], decided by the United States Supreme Court on June 25, 1973, the same day as *Roaden,* does not apply to the case at issue since in that case, although a search warrant was duly issued by the Court, as Chief Justice Burger pointed out in the majority opinion, the distinct difference in *Heller* is that after three police officers observed the film called BLUE MOVIE, the Judge who is-

sued the search warrant accompanied a police officer, purchased a ticket and saw the entire film. Chief Justice Burger stated at page 488:

> ". . . he had a full opportunity for independent judicial determination of probable cause prior to issuing the warrant, and that he was able to 'focus searchingly on the question of obscenity.' " (page 13 CrL 3241)

Chief Justice Burger continued on page 492:

> "In addition, on a showing to the trial court that other copies of the film are now available to the exhibitor, the court should permit the seized film to be copied so that showing can be continued pending a judicial determination of the obscenity issue in an adversary proceeding. Otherwise, the film must be returned."

The Affidavit for a search warrant and the search warrant itself violates the terms of the CITY OF EAST DETROIT Ordinance Section 9.302, in that the test to be applied, according to said Ordinance, in part, states:

> ". . . The book, picture, or other subject of complaint must be judged as a whole in its entire context, not by considering detached or separate portions only . . ."

and Det/Sgt Durning, to support his Affidavit, details explicit detached and separate portions, as indicated in paragraphs 3, 4, 5 and 6 of his Affidavit.

Despite numerous requests by defense counsel and cooperating even to the degree of allowing Respondents' theatre to be used for showing of the film to the Judge in the course of the trial, the CITY OF EAST DETROIT still refused to return the film, THE COLLEGIATES. No one could characterize the illegality of the proceedings more than Det/Sgt Durning, who, on top of the police report, has entitled, "Raid: Capri Theatre."

There are numerous defects in the proceedings themselves, for example:

1. The Municipal Judge's return by Martin Smith dated the 15th day of April, 1974, does not specify the crime alleged to have occurred, but it is conclusory by simply saying, "Displaying an obscene motion picture, THE COLLEGIATES."
2. The Complaint signed by Det/Sgt Durning is likewise conclusory.
3. The Judge's return stated, "Upon a jury trial held on the 9th day of March," is defective in describing the proceedings in that Respondents waived a jury trial and the trial was held by the Court.
4. A return of the original search warrant and affidavit had not been filed with the Court.
5. The Magistrate's return on LININGTON states that Martin Smith issued the warrant, but the name Calvin Rock appears thereon.
6. In addition, the return on LININGTON appears that it does not have an original signature, but a rubber stamp of the Judge Calvin Rock as do many of the other documents in the file.

The Trial

Although the trial was brief before Martin Smith, since Respondents were attacking the constitutional validity of the Ordinance, it appears as Respondents argue that 1) Judge Smith did not follow the tests applied in *Miller* and *Paris Adult Theatre I,* in finding the Respondents guilty. In the event that he had followed such tests, he would have found the Respondents not guilty and the Ordinance of the CITY OF EAST DETROIT unenforceable; 2) Judge Smith, in addition, failed or refused to follow the require-

ments of his own Ordinance in applying the tests required by said Ordinance, in that it requires applying "standards of common conscience of the community"; 3) the trial for THE COLLEGIATES was held on the morning of April 9 by the Court. A jury trial was held on the same day for the film THE DEVIL IN MISS JONES which, according to a number of cases previously cited by Respondents, was found to be obscene and contained the explicit scenes detailed in Det/Sgt Durring's Affidavit in support of the search warrant in paragraphs 3, 4, 5 and 6 therein, and yet, the East Detroit jury, which is supposed to be the conscience of the community, found the Defendants who exhibited THE DEVIL IN MISS JONES not guilty.

Conclusions

It is the contention of Respondents that they have been deprived of due process by virtue of the aforesaid procedural violations as to illegal seizure of the film in question, improper proceedings, the numerous defects recited in the proceedings themselves, and the failure of the trial judge to apply the tests required in the *Miller* and *Paris Adult Theatre I* cases, and finding the Respondents guilty.

LEGAL DEVELOPMENTS SUBSEQUENT TO CIRCUIT COURT RULING

The developments in the law as enunciated by the United States Supreme Court and the Michigan Supreme Court since the original ruling by the Circuit Court offer even less support to Petitioner. For example, in *Lewis* v *New Orleans,* 415 US 130; 39 L Ed 2d 214; 94 S Ct [1974], the City ordinance making it unlawful to use obscene language to a police officer was declared unconstitutional in violation of the First and Fourteenth Amendments because the City ordinance was facially overbroad.

In addition, a Jacksonville City ordinance, which sought to prohibit drive-in theaters from showing movies containing any nudity, was described to be facially invalid as an infringement on First Amendment Rights. *Erznoznik* v *City of Jacksonville,* 422 US 205; 45 L Ed 2d 125; 95 S Ct 2268 [1975]. It is interesting to note that in the opinion by Justice Powell, a recitation of the ordinance is strikingly similar to the "prohibited parts" of the human body as appears in the East Detroit ordinance. The Jacksonville ordinance prohibits the showing of ". . . the human male or female bare buttocks, human female bare breasts, or human bare pubic areas . . ." Compare this language to the language of the East Detroit ordinance appearing on page two of the Respondents' brief herein.

Another striking similarity is that as Justice Powell says, under Roman Numeral II of his opinion on page 208:

> "Appellee concedes that its ordinance sweeps far beyond the permissible restraints on obscenity, see *Miller* v *California,* 413 U.S. 15 (1973), and thus applies to films that are protected by the First Amendment."

Erznoznik v *City of Jacksonville, supra.*

In oral argument, the East Detroit City Attorney admitted that the ordinance did not comply with *Miller* and that East Detroit subsequently amended the ordinance to comply.

As Respondents argue in this case, Justice Powell recites in *Erznoznik, supra,* at page 209:

> ". . . when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power." "Such selective restrictions have been upheld only when the speaker intrudes on the privacy of

the home, . . ." Continuing, "The Jacksonville ordinance discriminates among movies solely on the basis of content."

And later, as Respondents further argued with reference to the invalidity of the ordinance, in *Erznoznik, supra,* Justice Powell stated at page 213:

> "Rather, it sweepingly forbids display of all films containing any uncovered buttocks or breasts, irrespective of context or pervasiveness. Thus it would bar a film containing a picture of a baby's buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigenous." "Clearly all nudity cannot be deemed obscene even as to minors."

In conclusion, Justice Powell states at page 217:

> "Where First Amendment freedoms are at stake we have repeatedly emphasized that precision of drafting and clarity of purpose are essential. These prerequisites are absent here."

And finally, in the rehearing by the Michigan Supreme Court, of the *Bloss* case, the Court said PER CURIAM,

> "We are persuaded that defendant's conviction cannot stand for the reason that at the time he did the act complained of this Court had not construed the obscenity statute (as permitted in *Miller*) to proscribe such conduct."

and reversed the conviction and discharged the Defendant. *People* v *Bloss,* 394 Mich 79 [1975].

Only when a precise, objective, clear definition of obscenity is drawn will cases, such as this one, no longer form a part of the Appellate Court's questioned decisions. However, the very subjective nature of obscenity seems to preclude that possibility.

CONCLUSION

I. The Preliminary Injunctive Order entered on the 21st day of November, 1975, by the Honorable Edward J. Gallagher, provided among other things, that the City of East Detroit would be enjoined from execution of violation complaints, arrests, and confiscation of films pursuant to the provisions of said Ordinance until such time as *this Honorable Court, the Michigan Court of Appeals or the Michigan Supreme Court,* alters, amends or reverses the Order of the trial judge entered on the 9th day of December, 1974, in which the criminal proceedings under the alleged East Detroit Obscenity Ordinance were quashed.

II. It is a matter of public record the Michigan Court of Appeals, in a decision released on May 27, 1976, in an appeal from the criminal enforcement of the Ordinance *affirmed Judge Gallagher* and therefore, the Order dated the 9th day of December, 1974, having been affirmed, *has not* been altered, amended or reversed.

III. That said decision by the Court of Appeals is presently on appeal to the Michigan Supreme Court for clarification on the issue of a municipality's power to enact ordinances of this type and kind.

IV. That the City of East Detroit, despite the appeals in this case and the Injunctive Order, continues to harass the Petitioner by an indirect manner, the latest of which acts is the refusal to issue routinely a business license to said Theatre and the reasons given therefore: 'Because of continued violations of the Ordinance (the Obscenity Ordinance) which is being questioned on appeal. (Newspaper article follows):

Court battle goes on;
so do x-rated flicks

By BOB CAMPBELL
Macomb Daily Staff Writer

EAST DETROIT — Macomb County Circuit Judge Edward J. Gallagher Monday refused to order the city to issue a license to the Capri Theatre, one of two adult theaters in the city embroiled in a still simmering legal battle.

Gallagher said that since the Michigan Court of Appeals had already entered the litigation case between the city and theatre that he no longer had jurisdiction.

The appeals court recently upheld Gallagher's decision voiding the Municipal Court conviction of the theater for showing the movie "The Collegiates" in 1973.

Robert S. McKenzie, attorney for Capri owner Robert Vickrey, said that the license denial constituted enforcement of the obscenity ordinance that the city is now enjoined from enforcing under a November, 1975 order from Gallagher.

Two weeks ago Joseph Mihelich, representing the city, had asked Gallagher to lift the injunction so that the city could begin enforcing the ordinance.

Though the appeals court found the ordinance under which the city had prosecuted the Capri unconstitutional it also ruled that local governments do have a right to adopt and enforce pornography laws that meet requirements laid out by the U.S. Supreme Court.

(Continued on Page 3-A)

Court battle goes on

(Continued from Page 1-A)

Since that prosecution the city has enacted a new less vague, less far-reaching ordinance.

Gallagher said two weeks ago that for the same reason he gave Monday — lack of jurisdiction — he could not lift the restraining order.

Now the city is denying the Capri a license for several reasons, foremost of which is the Capri's continued showing of "hard-core" pornographic films.

In court Monday however, Lee Taut, who is working with Mihelich on the case, said that the Capri had not made a written license application and also violated a licensing regulation adopted in 1973 that prohibits an adult theater from operating within 1,000 feet of a public building.

The East Detroit Post Office is across the street from the Capri. Mihelich said the ordinance was originally aimed at preventing the licensing of the Stage Theatre which opened an x-rated house on Gratiot directly across the street from City Hall.

But City Manager W. Larry Collins and administrative assistant Leonard Tropea both told The Macomb Daily Monday that the license denial was made because the case involving the pornography ordinance was still pending in court.

Collins, in fact, said he was not aware of the licensing ordinance mentioned by Taut.

Tropea, who handles licensing of city businesses, said Mihelich told him "due to the thing pending" not to mail an application for a license — as has been done for nearly 15 years each spring with the Capri.

Mihelich, when questioned later, said that the continued violation of the ordinance was part of the reason for the license denial.

"The city does not want to be placed in a position of voluntarily giving a license when the Capri is still showing pornographic movies in violation of the city obscenity ordinance," he said.

But even though the Capri and the Stage, which has never had a license, are now operating without licenses, Mihelich said the theaters will be left alone until the injunction is lifted.

The appeals court will be asked to remove Gallagher's order later this week, Mihelich said. That could take from two to six weeks.

— Macomb Daily 6/22/76

V. The City of East Detroit has failed to show on appeal or in its brief that the Injunctive Order interferes with the maintenance of the public health, safety and morals of the citizenry of East Detroit and in fact, by the City's acts through its attorneys and agents, exhibits cogent reasons for the continuance of the Injunctive Order issued by the trial court on the 21st day of November, 1975.

VI. Petitioner, therefore, respectfully suggests that the City has failed to show that it has the power to adopt said obscenity ordinance; has failed to show good and sufficient reason for dissolution of Judge Gallagher's Injunctive Order issued on the 21st day of November, 1975; and has failed to show sufficient and adequate justification for an appeal on dissolution of said Injunctive Order without a hearing on the merits before the Honorable Edward J. Gallagher.

It is interesting to note that on May 22, 1976, Justice William J. Brennan, Jr., of the United States Supreme Court, in an address to the New Jersey Bar Association said:

> "Of late, however, more and more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased. This is surely an important and highly significant development for our constitutional jurisprudence and for our concept of federalism."

In Michigan, Justice Brennan's comments should weigh even more heavily since the relevant section of the Federal First Amendment provides:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

While in contrast, the Michigan Constitution provides:

> "Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press."

In an excellent article on the subject in the Michigan State Bar Journal, December, 1975, by John M. Burkoff and Victor T. Adamo, on page 969, the authors indicated:

> "But the Michigan provision's language (purposely, as we will later see) goes beyond the thrust of the First Amendment in its first clause as it expressly reserves free speech rights for all persons on all subjects.
>
> "The difference in language — telling legislatures what they cannot do as contrasted with telling the people what they can do — is of obvious significance when placed in historical context."

The authors came to this conclusion:

> "That the scope of protected speech in Michigan is very broad indeed — far broader than the current notion of the breadth of federally protected speech."

Petitioners are forced to agree with the authors wherein on page 973 they stated:

> "Not only are the states free to set sail on their own course in regulating obscenity within the minimum Federal constitutional protections; reason and responsibility compel them to do so. In Michigan, although the recent Bloss #2 decision failed to come to analytical grips with the significant questions that must eventually be answered, the opinion does stand as an indication the Michigan Court is aware that the obscenity problem in this state must be approached in the con-

text of the expansively written free expression provision in the Michigan Constitution."

PREEMPTION

Finally, it is interesting to note that the regular session of the 1977 Michigan State Legislature adopted a statute dealing with "Child porongraphy" being MCLA §750.-145C; PA 301, 1977, a copy of which is incorporated herein:

PENAL CODE—CHILD ABUSIVE COMMERCIAL ACTIVITY

PUBLIC ACT NO. 301

HOUSE BILL No. 4332

AN ACT to amend Act No. 328 of the Public Acts of 1931, entitled "An act to revise, consolidate, codify and add to the statutes relating to crimes; to define crimes and prescribe the penalties therefor; to provide for the competency of evidence at the trial of persons accused of crime; to provide immunity from prosecution for certain witnesses appearing at such trials; and to repeal certain acts and parts of acts inconsistent with or contravening any of the provisions of this act," as amended, being sections 750.1 to 750.568 of the Compiled Laws of 1970, by adding section 145c.

The People of the State of Michigan enact:

Section 1. Act No. 328 of the Public Acts of 1931, as amended, being sections 750.1 to 750.568 of the Compiled Laws of 1970, is amended by adding section 145c to read as follows:

M.C.L.A. § 750.145c

Sec. 145c. (1) As used in this section:

(a) "Child" means a person who is less than 18 years of age, is not emancipated by operation of law

as provided in section 4(1) of Act No. 293 of the Public Acts of 1968, as amended, being section 722.4 of the Michigan Compiled Laws.

(b) "Commercial purpose" means any purpose for which monetary gain or other remuneration could reasonably be expected or anticipated, or has already been received or arranged for. Commercial purpose shall not be construed to mean processing. However, processing may be used, where applicable, to demonstrate the ultimate sale, distribution, showing, rental, lease, or use for remuneration was intended. "Processing", as used in this subdivision, means photographing, filming, or sound record, or the reproducing, copying, or printing of a photograph, film, slide, electronic visual image or sound recording.

(c) "Erotic fondling" means touching a person's clothed or unclothed genitals, pubic area, buttocks, or, if the person is female, breasts, or if the person is a child, the developing or undeveloped breast area, for the purpose of, real or simulated overt sexual gratification or stimulation of 1 or more of the persons involved. Erotic fondling shall not be construed to include physical contact, even if affectionate, which is not for the purpose of, real or simulated, overt sexual gratification or stimulation of 1 or more of the persons involved.

(d) "Erotic nudity" means the display of the human male or female genital or pubic area, or developed or developing female breast, in a manner which lacks primary literary, artistic, educational, political, or scientific value and which the average person applying contemporary community standards would find appeals to prurient interests. As used in the subdivision, "community" means the state of Michigan.

(e) "Financing" means the furnishing of funds or capital for a commercial purpose. Financing shall not be construed to mean the simple purchase or rental of a material or activity after it is created or produced.

(f) "Listed sexual act" means sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, or erotic nudity.

(g) "Masturbation means the real or simulated touching, rubbing, or otherwise stimulating a person's own clothed or unclothed genitals, pubic area, buttocks, or,

Substantive changes in text indicated by underline

if the person is female, breasts, or if the person is a child, the developing or undeveloped breast area, either by manual manipulation or self-induced or with an artificial instrument, for the purpose of, real or simulated, overt sexual gratification or arousal of the person.

(h) "Passive sexual involvement" means an act, real or simulated, which exposes another person to or draws another person's attention to an act of sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, sexual excitement, or erotic nudity because of viewing any of these acts or because of the proximity of the act to that person, for the purpose of, real or simulated, overt sexual gratification or stimulation of 1 or more of the persons involved.

(i) "Child abusive commercial activity" means a child engaging in a listed sexual act which was or is for a commercial purpose.

(j) "Child abusive commercial material" means a developed or undeveloped photograph, film, slide, electronic visual image or sound recording of a child engaging in a listed sexual act, or any reproduction, copy, or print of such a photograph, film, slide, or sound recording, which was or is for a commercial purpose.

(k) "Sadomasochistic abuse" means either of the following:

(i) Flagellation or torture, real or simulated, for the purpose of real or simulated sexual stimulation or gratification, by or upon a person.

(ii) The condition, real or simulated, of being fettered, bound, or otherwise physically restrained for sexual stimulation or gratification of a person.

(l) "Sexual excitement" means the condition, real or simulated, of human male or female genitals when in a state of real or simulated overt sexual stimulation or arousal.

(m) "Sexual intercourse" means intercourse, real or simulated, whether genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between a human and an animal, or with an artificial genital.

(2) A person who causes or knowingly allows a child to engage in a child abusive commercial activity, or a person who arranges for, produces, makes, or finances, or a person who attempts or prepares or conspires to arrange for, produce, make or finance any child abusive commercial activity or child abusive commercial material is guilty of a felony, punishable by imprisonment for not more than 20 years, or a fine of not more than $20,000, or both, if both of the following occur:

(a) That person knows, has reason to know, or should reasonably be expected to know that the child is a child, or that person has not taken reasonable precautions to determine the age of the child.

(b) That person knows, has reason to know, should reasonably be expected to know, or intends that the child abusive commercial activity or child abusive commercial material is or was for a commercial purpose.

(3) A person who commercially distributed or promotes, or finances the distribution or promotion of, or

receives for the purpose of commercially distributing or promoting, or conspires, attempts, or prepares to so distribute, receive, finance, or promote any child abusive commercial material or child abusive commercial activity is guilty of a felony, punishable by imprisonment for not more than 7 years, or a fine of not more than $10,000, or both, if both of the following occur:

(a) That person knows, has reason to know, or should reasonably be expected to know that the child is a child.

(b) That person knows, has reason to know, should reasonably be expected to know, or intends that the prohibited commercial activity or child abusive commercial material is or was for a commercial purpose.

(4) Expert testimony as to the age of the child used in a child abusive commercial material or a child abusive commercial activity shall be admissible as evidence in court and may be a legitimate basis for determination of age, if age has not otherwise been proven.

deletions by asterisks * * *

(5) This section shall be applicable and uniform throughout the state and all political subdivisions and municipalities in the state.

(6) A local municipality or political subdivision shall not enact ordinances, nor enforce existing ordinances, rules, or regulations governing child abusive commercial activity or child abusive commercial material as defined by this section.

Approved Dec. 31, 1977.

It is to be noted that this Act is the only valid Statute in Michigan dealing with pornography and as illustrative of the State Legislature's intent in maintaining uniformity and preempting the field, the Court's attention is directed to sub-sections 5 and 6 in which the Legislature expresses that the material be uniform throughout the State and

expressly prohibits municipalities from enacting ordinances or enforcing existing ordinances, rules or regulations governing the subject.

It would seem from this action, that the Legislature has expressed a clear intention to preempt the law of regulation of pornography.

RELIEF REQUESTED

For the reasons cited herein, the Respondents respectively request that this Honorable Court deny Petitioner's Writ of Certiorari to the Supreme Court of the State of Michigan with costs and attorney fees taxed in favor of the Respondents hereon.

Respectfully submitted,

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